

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAJUAN D. HALE,

Defendant-Appellant.

UNPUBLISHED

September 29, 2005

No. 254412

Wayne Circuit Court

LC No. 01-005525-01

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of twenty-eight to sixty years for second-degree murder, MCL 750.317, imposed on remand. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted by a jury of second-degree murder and possession of a firearm during the commission of a felony, MCL 750.227b, in the shooting death of Nelson Hardiman. The statutory sentencing guidelines established a minimum term range of 13½ to 22½ years for second-degree murder. At sentencing, the trial court found that the following substantial and compelling reasons existed to depart upward from the guidelines: (1) Hardiman was unarmed at the time of the shooting; (2) defendant shot Hardiman seven times; (3) defendant shot Hardiman in the back; (4) Hardiman was running away from defendant when he was shot; (5) defendant spit on Hardiman's body; and (6) defendant attempted to run over Hardiman's body with his vehicle. The trial court sentenced defendant to thirty-five to sixty years for second-degree murder, and to the mandatory consecutive term of two years for felony-firearm.

In *People v Hale*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2003 (Docket No. 243733), we affirmed defendant's convictions but remanded for resentencing on the conviction of second-degree murder. We stated:

We find that it was not clear error for the trial court to determine that defendant shot Hardiman in the back seven times while he was running away and that he spit on Hardiman and attempted to run over Hardiman's body. [Witnesses] testified that they saw defendant shoot Hardiman in the back while he was running away and that defendant spit on Hardiman and veered while he was driving away in an attempt to run over Hardiman. The medical examiner testified that Hardiman had seven bullet wounds in the head, back, thigh, and arm.

Defendant's baseball cap was found at the scene, as were numerous spent bullets and bullet casings. From the evidence presented, it was not clear error for the trial court to find that these factors existed.

We additionally find that the factors that defendant shot Hardiman seven times from the back while Hardiman was running away, spit on Hardiman, and attempted to run over Hardiman's body were all objective and verifiable. In defining "objective and verifiable" this Court has stated that "the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant and others involved in making the decision, and must be capable of being confirmed." See *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The evidence presented showed actions and occurrences external to the minds of the decision makers that were verified by the testimony of witnesses or scientific evidence.

We find that those factors found to be objective and verifiable are also substantial and compelling. To be substantial and compelling, a reason "should 'keenly' or 'irresistibly' grab" the attention of the court. The reason should be of "considerable worth" in deciding the length of the sentence." [*People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003).] The trial court noted the extraordinary nature of defendant's conduct after killing Hardiman. Shooting one's victim in the back, shooting one's victim six more times after he has fallen, spitting on the body of one's victim, and attempting to run over the body of one's victim are all reasons that "keenly" or "irresistibly" grab a court's attention and are of "considerable worth" in determining whether a defendant's sentence is an appropriate length. We find that determining these factors to be substantial and compelling reasons for departure is an outcome within "the permissible range of outcomes" and therefore was not an abuse of discretion. [*Hale*, slip op at 6.]

We found that the trial court erred by finding that Hardiman was unarmed when defendant shot him, and remanded for resentencing "to allow the trial court to determine if it would depart to the same degree without relying on [that] factor." *Id.*, slip op at 7-8. On remand, the trial court sentenced defendant to twenty-eight to sixty years for second-degree murder.

We review a constitutional issue de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). However, because defendant failed to raise challenges to his sentence at the time of sentencing or in a motion for resentencing, our review of his claims is limited to one for plain error affecting his substantial rights. *People v Wyrick*, 265 Mich App 483, 491; 695 NW2d 555 (2005).

To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. *Babcock*, *supra* at 257-258. The law of the case doctrine provides that an appellate ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

Defendant argues that he is entitled to a second resentencing on his conviction of second-degree murder because the trial court's findings supporting its decision to exceed the guidelines were not determined by a jury as required by *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Moreover, defendant asserts that the trial court failed to articulate substantial and compelling reasons for exceeding the guidelines on resentencing.

We disagree and affirm. Our Supreme Court has stated that *Blakely, supra* (and therefore *Apprendi, supra* on which *Blakely, supra*, relied) does not apply to Michigan's system of indeterminate sentencing because under that system the maximum term is not set by the sentencing court, but rather is determined by statute. MCL 769.8(1); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). We have determined that we are bound by the statement in *Claypool, supra*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).¹ The trial court did not err by relying on facts not found by the jury beyond a reasonable doubt as support for its decision that substantial and compelling reasons existed to exceed the guidelines.

In defendant's original appeal, we found that five of the six reasons articulated by the trial court for exceeding the guidelines were substantial and compelling, and that the trial court did not abuse its discretion by determining that a departure from the guidelines was warranted based on those reasons. That finding stands as the law of the case. *Herrera, supra*. Thus, on remand, the trial court was not required to articulate substantial and compelling reasons for exceeding the guidelines that were different from those articulated at the time of the original sentencing proceeding. Rather, it was required to determine whether it would have departed from the guidelines to the same degree had it not relied on an invalid finding, i.e., that Hardiman was unarmed when defendant shot him. The trial court determined that the elimination of the invalid factor warranted a reduction in defendant's minimum term from thirty-five to twenty-eight years. Defendant did not abuse its discretion by exceeding the guidelines based on factors found by this Court to be substantial and compelling. *Babcock, supra*; *Herrera, supra*.

Affirmed.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio

¹ In *United States v Booker*, ___ US ___, 125 S Ct 738; 160 L Ed 2d 621 (2005), the Supreme Court reaffirmed its holdings in *Apprendi, supra*, and *Blakely, supra*. Nevertheless, we are bound to adhere to *Claypool, supra*. *Drohan, supra*.